SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1132

STATE OF CALIFORNIA AND WALTER R. PEDRETTI, CHIEF OF POLICE OF THE CITY OF SAN PABLO, *Petitioners,*

vs.

ALBERT J. GIANNINI AND KELLEY ISER, *Respondents.*

Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California

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Respondents, ALBERT J. GIANNINI and KELLEY ISER, pray that the petition for writ of certiorari herein be denied.

JURISDICTION

Respondents contend that this case is moot because under the laws of the State of California they cannot be retried for the acts which are the subject matter of this case and because they can never suffer any sentence or disability due to the said acts.

QUESTIONS PRESENTED

1. Whether the case is moot because the statute of limitations under the law of the State of California bars further proceedings against the respondents.

2. Whether a "topless" dance performed in the context of a theatrical production is entitled to the protection of the freedom of expression provisions of the First Amendment.

3. Whether it is unconstitutional for the California Supreme Court, in judging allegedly obscene matter, to hold that the relevant "community" from which the applicable standards must be taken was the State of California.

4. Whether the California Penal Code Sections 311 and 314 are unconstitutionally vague.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of California Penal Code Sections 1382 and 1387 are set forth in Appendix A hereto.

STATEMENT OF THE CASE

The statement of the case as it appears in the petition is correct but incomplete. The court should be aware of the circumstances under which the "topless" dance was performed. A large sign with the word "topless" stood outside the night club. (RT 39-40) A small sign at the entrance indicated that persons under 21 years of age were not allowed and an employee checked at the door for identification to make sure no minors entered. (RT 53) Miss Iser danced to the popular music of the day provided by a small musical group. Her act was introduced by a master of ceremonies and after each number there was applause from the audience. (RT 42-43) Stage lighting and effects were used, and there was a public address system. All of the dancing was performed upon a stage. (RT 54-56) The dancing could not be seen from outside the club. (RT 52) The audience was at all times orderly and consisted of men and women. (RT 49)

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. The Case At Bar Is Moot Because the Respondents Cannot Be Retired and Because They Can Never Suffer any Sentence or Other Disability Due to the Acts Which Are the Basis for This Action.

California Penal Code Section 1382 provides that unless good cause to the contrary is shown, a misdemeanor complaint must be dismissed when the defendant is not brought to trial after a reversal on appeal within thirty days after the remittitur is filed in the trial court. Furthermore, an order for the dismissal of the misdemeanor complaint is a bar to any other prosecution for the same offense. California Penal Code Section 1387.

The California Supreme Court decision granting the writ of habeas corpus and reversing the judgment of the trial court was final on December 14, 1968, and a certified copy of the decision was remitted to the trial court on December 16, 1968, and the remittitur was entered upon the records of the Supreme Court. As of the date of this Answer, the respondents have not been summoned to court for a new trial, a date has not been set, nor has any action whatsoever been taken to proceed against the respondents. Respondents have not agreed to any postponement or continuance of a trial date and have at all times stood ready to proceed to trial. Respondents have made a formal motion in the trial court for an order dismissing the complaint, and the motion is now pending.

Since it would appear that respondents are entitled to a dismissal of the complaint and since that dismissal is a bar to all further proceedings for the same offense, the respondents are not subject nor can they in the future be subjected to any sentence or other disability arising out

of the offense charged. Therefore, the case before this court is moot, and the petition for certiorari should be denied. *Jacobs v. New York,* 388 U.S. 431 (1967); *Tannenbaum v. New York,* 388 U.S. 439 (1967); *St. Pierre v. United States,* 319 U.S. 41 (1943).

II. "Topless" Dancing Is a Form of Communication Entitled to the Full Freedom of Speech Protections Afforded by the First and Fourteenth Amendments.

Petitioners would have the court accept this case for decision in order to deny *prima facie* First Amendment protection to this dance because it was performed "live" rather than in a "fixed media of expression" such as a moving picture. They argue that the decisions of this court in the area of obscenity have all been cases involving "fixed media" communication and that the tests developed for determining obscenity in *Roth v. United States,* 354 U.S. 476 (1957) and subsequent cases do not apply to the "live" communication of ideas. The recent decision in *United States v. O'Brien,* 391 U.S. 367 (1968) is cited as authority for the above premise.

The parties agree on the characterization of the subject matter before the court. We are here concerned with a "live" theatrical performance, which happens to be in the art form of the dance, and which art form is used for the communication of ideas. Respondents suggest that this type of communication is entitled to the application of the constitutional tests for obscenity and that there is no basis either in decisions of this court or in reason for distinguishing between "live" and "fixed media" communication of ideas.

Though it may be true that the decisions of this court in the obscenity field have dealt exclusively with fixed media of expression, it does not follow that "live" expres-

sion is excluded from the protections accorded by the First Amendment. Respondents suggest that the decision of this court in *Jacobellis v. Ohio,* 378 U.S. 184 (1964) would have been the same if the subject matter had been a stage play rather than a screen play. The dance which was performed by respondent Iser should be tested by the same rules whether it was performed "live" or in the context of a moving picture. If any speech is protected at all, it surely must be the basic direct communication between persons by use of voice, gesture and body movement uncomplicated by the intervention of "fixed media."

The authority cited by petitioners for the distinction they would have this court make between "live" and "fixed media" communication is *United States v. O'Brien,* supra. The cited case is not an obscenity case and does not involve the question of "live" versus "fixed media" communication. The holding in that case would have been no different if Mr. O'Brien had burned his draft card before the movie camera and then showed the film to an audience for the purpose of communicating his opposition to war. The question which the *O'Brien* case considers is the problem which occurs when speech and non-speech elements are combined in the same course of conduct. The issue is whether the government can regulate the non-speech elements without infringing upon constitutional protections of freedom of speech. Respondents suggest that this is the real issue which petitioners seek to raise on this point, and it has nothing to do with whether or not the activity is performed "live" or in a movie.

In *United States v. O'Brien,* the court held that ". . . when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment

freedoms . . ." Respondents submit that government does not have a sufficiently important nonspeech interest in regulating the form of a dance, including the costume and bodily movements, to justify taking the acts in question outside the protection of the First Amendment. The petitioners reply that the states have a substantial interest in preventing "sexual misconduct."

But, the labeling of Miss Iser's dance as "sexual misconduct", in fact, assumes the question which is in issue and does not help to supply an overriding governmental interest because nobody knows what "sexual misconduct" is. This court has declined to hold the portrayal of the naked body, including genitalia, as obscene *per se. Manual Enterprises v. Day,* 370 U.S. 478 (1962); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372 (1958) (per curiam). Furthermore, the portrayal of "sexual misconduct" on the stage is a legitimate exercise of free speech if it is not obscene. Thus, all roads lead back to the basic question of obscenity, and the only way to make a determination of obscenity is by using the rules of the *Roth case* and subsequest decisions and by applying the judicial litmus to the acts in question—which is exactly what the California court held.

The main reason that the *O'Brien* case does not apply is because O'Brien was not performing his act of draft card burning in the context of a theatrical performance. Respondents contend that this court has long since decided that the First Amendment protections shall be prima facie extended to the performing arts. *Jacobellis v. Ohio,* 378 U.S. 184 (1964). In *Winters v. New York,* 333 U.S. 507 (1948), the court stated, "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the in-

forming and the entertaining is too elusive for the protection of that basic right."

In all kinds of theatrical performances, including the dance, speech and nonspeech elements are inextricably combined. That which may be called "conduct" when it occurs on the street, when put in the context of a play, movie or dance, is in fact a part of the total attempt to communicate with the audience. To attempt "incidental" restrictions on the so called "nonspeech" or "conduct" parts of a piece of entertainment is in effect to abridge the entire piece of communication being presented.

Petitioners would have this court change the rule giving *prima facie* First Amendment protection to conduct occurring in the context of a theatrical performance because overt sexual acts could be committed with impunity merely by including them in the script of a play or theatrical production. The answer to this argument is that the protection afforded to theatrical performances is only *prima facie* and not complete. The conduct must be judged by the rules; and if it is found to be obscene, it may be proscribed and punished. Under the California Statute, the matter will be adjudged obscene and not entitled to protection if it "goes substantially beyond customary limits of candor in description or representation of such matter." Clearly, the danger of our stages being made havens for sexual perversion is not great under such a test and the trier of fact and the reviewing courts should have little difficulty in dealing with the extreme examples set forth by the petitioners. See *Dixon v. Municipal Court*, 267 A.C.A. 875 (1968).

III. It Is Not Unconstitutional for the Purposes of Determining the Obscenity of the Performed Dance Here in Question to Hold that the Relevant "Community" Is the Entire State of California.

Petitioners correctly state that there is a conflict among state and federal courts as to the proper "community" to be used in determining what the community standards of decency are under the tests set forth for the determination of obscenity. This court has not ruled on this question. Petitioners would have the court accept this case so that a "variable community" rule could be adopted, the relevant community to be determined in each case by the "type of media involved, the probable extent of its distribution and the intended or probable recipient audience." Petitioners cite *Ginsberg v. New York,* 390 U.S. 629 (1968) and *Mishkin v. New York,* 383 U.S. 502 (1966) as authority for this proposition.

The two cases cited by the petitioners do not involve the question of "community standards." *Ginsberg v. New York* held that minors do not have the same rights in the area of freedom of expression as adults and that the States may constitutionally restrict the freedom of children where they could not do so for adults. The *Mishkin* case dealt with the problem of "prurient interest" and refined the anti-*Hicklin* definition of *Roth* to include matter within the ambit of obscenity if it appealed to the prurient interest of a clearly definable deviant sexual group and not just to the prurient interest of the "average person." The fact that for the purpose of defining prurient interest the court in *Mishkin* looked to the "intended and probable recipient group" does not lead to the conclusion of the petitioners that this must be the test for determining the relevant community standard to be applied. This concept is taken completely out of context by the petitioners, and it is not authority for their broad and unique proposition that the extent of the rele-

vant community must vary with each different kind of communication and each different kind of audience.

Even if it is assumed that a variable community standard is desirable, which is a highly questionable proposition, this court should not adopt such a sweeping rule in this case, for the court would be required to set down rules based upon cases and fact situations not before it. If such a rule were announced in general terms, such as the terms used by the petitioner, the court would thereupon invite a deluge of cases arising from every combination of the three variables—media of communication, extent of distribution and intended or probable audience. Members of this court have from time to time expressed concern over the tremendous volume of obscenity cases with which the court is now beset. A variable community standard rule without a specific classification of all possible fact situations would increase this volume many times over.

Respondents contend that for any media, any audience and any purpose connected with the definition of obscenity under the First Amendment, the designation of a local community as the relevant community in determining the community standard is an unreasonable and dangerous abridgment of the freedom of speech. Such a rule would create a literal "jigsaw puzzle" for the producer, performer or writer. The particular community standards of each county, district, or town would have to be ascertained before controversial sexual ideas or themes could be introduced. A mistake as to the local community standard could result in criminal punishment for the performer or the writer. Also, some of the factors, such as probable audience and area of dissemination, might easily be outside the control of the artist, producer or writer who would, nevertheless, be held criminally responsible under the variable standard rule. Thus, the application of a variable local standard would either present a serious problem of due process and

equal protection of the law *vis a vis* the writer or performer who dared to venture into the community whose standard was unknown, or it would produce a great deterrent to the free exchange of ideas among all of our communities. Such a variable local standard, or rather a myriad of standards, would produce voluminous litigation and would make it impossible to apply the criminal statutes of a state uniformly and equally throughout the entire state.

Even if this court were of the opinion that in the case at bar a local standard is appropriate, the decision of the California Court must be upheld. States are free to adopt a definition of obscenity which is more stringent than that required by the Federal Constitution. *Mishkin v. New York,* supra, at page 383. The California court has held that the standard must be measured by the entire state of California. This rule puts more of a burden upon the prosecution to prove such a standard and also allows much greater freedom of expression than would be allowed under a local standard. Since the California rule is less of a restriction on free speech and is a more stringent test for obscenity than the "local standard" rule, this court should uphold the decision in any event.

IV. The California Penal Code Sections 314 and 647(a) Are Unconstitutionally Vague.

The respondents vigorously attacked the two criminal statutes in the court below on the ground that they were unconstitutionally vague. The portion of the Petition for Writ of Habeas Corpus devoted to the question of uncertainty is attached hereto as Appendix B. The California Supreme Court did not reach the issue of uncertainty because it accepted respondents' contention that the words "lewdly" and "lewd and dissolute" in Penal Code Sections 314 and 647(a) as applied to a theatrical performance were

identical to "obscene" as that term is defined in Penal Code Section 311 which is in turn an embodiment of the pronouncements of this court. See *In Re Giannini and Iser,* 69 A.C. 588 (1968), footnote 4, page 9, of Appendix A of the Petition for Writ of Certiorari.

Although petitioners admit that they must accept the interpretation of the statute as made by the California Supreme Court, if their argument that the dance performance here in question is not entitled to *primâ facie* First Amendment protection, prevails, respondents will be effectively deprived of a determination as to whether or not the statutes are unconstitutionally vague. Petitioners argue on the one hand that the interpretation of the California Court is binding under *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963) and *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684 (1959), but on the other hand they ask this court to hold that the dance here in question is not entitled to the protection given by the California Court's interpretation.

Therefore, respondents submit that if the petitioners' view is accepted by the court, and this court holds that the dance here in question is not entitled to *prima facie* First Amendment protection, that the case must then be remanded to the California Supreme Court for a determination of the question of whether or not the statutes in question are unconstitutionally vague, or, in the alternative, this court should rule on the question.

CONCLUSION

For the reasons submitted above, respondents respectfully submit the writ of certiorari prayed for by the petitioners should be denied.

KENNETH LARSON
Attorney for Respondents.

(Appendices follow)

Appendix A

1. The pertinent provisions of California Penal Code Section 1382 provides:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
>
> * * *
>
> 3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial . . . in case the cause is to be tried again following . . . an appeal from the inferior court, within thirty days . . . after the remittitur is filed in the trial court. . . ."

2. California Penal Code Section 1387 provides:

> "An order for the dismissal of the action, made as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony."

Appendix B

I. California Penal Code Sections 314.1 and 647(a) Are so Vague, Ambiguous and Indefinite as to Provide No Ascertainable Standards for Determining Guilt, and to Permit the Arbitrary, Capricious and Discriminatory Abridgement of Speech, Press and Expression and Other Lawful Conduct Contrary to the Free Speech and Press, the Due Process, and Equal Protection Provisions of Article I, Sections 9, 11, 13 and 21 of the California Constitution and the Applicable Provisions of the First and Fourteenth Amendments to the United States Constitution.

A. *"Void for Vagueness" Judicial Tests.*

The terms of a criminal statute must be sufficiently definite to inform those who are subject to it what conduct on their part will make them liable to penalty. A statute with terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the essentials of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 391. All presumptions favor the validity of a statute and mere doubt is not sufficient reason for a judicial declaration of invalidity. *Lockheed Aircraft Corporation v. Superior Court,* 28 Cal. 2d 481, 484. The mere fact that different interpretations of a penal statute are possible does not make it unconstitutional. *In re Davis,* 242 C.A.2d 645, 652.

B. *The Uncertainties and Ambiguities of the Statutes.*

1. Penal Code Section 314.1 on its face presents several problems of interpretation and application which might prove difficult for a court of law to solve let alone a layman who is required to regulate his conduct according to the terms of the statute or suffer the penalties prescribed. Does the word "person" mean, as the trial Court held, the "whole person", that is, complete nudity, or does it mean any single part or portion of the person? If it means any single part or portion of the person, then why was it necessary to insert the words, "or the private parts thereof"? Does

the expression "private parts" refer only to the genitals or to the genital area? Does the expression "private parts" refer only to the organs of sex or excretion, or does it also apply to such areas as the navel, arm-pit, inside of the thigh or to the human breast? If the exposure of the human breast is meant to be prohibited, is it only the female breast which is included in the statute, and, if so, is it the entire breast or only portions of the breast such as the mammilla?

2. Another term in Section 314.1 which is not clear is the requirement that the exposure take place "in any place where there are present other persons to be annoyed thereby". Does this mean that the lewd acts may be performed in a non-public place as long as the acts do not actually offend or annoy any person present? Does it mean that the statute does not apply if the persons present consent to the performance? Or, does it merely mean that the lewd acts are outlawed, even in a private place, if there are *any* persons present who *might possibly* be annoyed or offended? Or, does it mean that the proscribed acts violate the section if in fact there are any persons present, *regardless of* whether or not the said persons are, or might be, offended or annoyed? If the last suggested alternative is correct, then does not the statute seem to proscribe otherwise lawful sex acts between husband and wife, or between consenting adults?

3. Finally, there is the central requirement of both of the statutes in question that the acts proscribed must be done "lewdly". What does "lewd" or "lewdly" mean? Does it depend upon the motive or intent of the performer? Does it depend upon the effect which the acts have on the persons present regardless of the motive or intent of the performer? Does it depend upon the tendency or likelihood of the act to appeal to the prurient interests of the persons

present regardless of its actual effect upon them, and, regardless of the intent or motive of the performer? Does the term "lewdly" mean "in an obscene manner" as the word "obscene" is defined in Penal Code Section 311?

C. *The Statutes Have Not Been Made Certain by Judicial Construction.*

Though statutes may be on their face vague and uncertain, judicial construction may give it meaning and such construction becomes a part of the statute "as if it had been so amended by the legislature." *Camp v. Bd. of Public Instruction,* 368 U.S. 278.

1. No cases have been found which provide any definite meaning or solve the problems of interpretation presented by the terms "person or private parts thereof" and "in any place where there are present other persons to be annoyed thereby" as they appear in Penal Code Section 314.1. There are judicial constructions of the terms "lewdly" and "lewd" and "dissolute". These decisions will be considered below.

2. The only case to consider the questions of the meaning of the term "lewdly" as used in Section 314.1 is *People v. Succop,* 249 ACA 277 (March 7, 1967). The defendant in that case was found guilty of exposing his penis in public before women and children. The acts were isolated incidents and were not a part of any stage production or night club entertainment. The issue of the vagueness of the term "lewdly" was raised by the defendant who acted at the trial and on appeal *in propria persona.* The Court summarily held that the term was not unconstitutionally vague. There was no attempt to define the term and the Court merely cited as authority for its holding the case of *People v. Loignon,* 160 Cal. App. 2d 412, which had upheld a similar term in Penal Code Section 288.

3. In *People v. Loignon, supra,* the defendant was convicted of committing oral copulation on a child. He contended on appeal that Penal Code Section 288 was unconstitutional in that the words "lewdly", "lewd" and "dissolute" and "lascivious" rendered it too vague to meet the requirements of due process. The Court held that the terms were not too vague for they were words of "general meaning" and were used in a sphere vital to the community, i.e. the welfare of its youth. The Court offered no definition or explanation of what the words meant. For authority the Court cited the case of *People v. Diebert,* 117 Cal.App. 2d, 410.

4. *People v. Diebert, supra,* involved a prosecution of a bar owner for selling intoxicants to minors in violation of Section 702 Welfare and Institutions Code, since repealed, which prohibited acts "which cause or tend to cause or encourage a minor to lead an idle, dissolute, lewd or immoral life". The Court upheld the statute against the attack based upon the uncertainty of the terms "idle", "dissolute", "lewd" and "immoral". The Court did not attempt to define the terms, or state their meaning, but incorporated the definitions given in *People v. Babb,* 103 Cal. App. 2d 326.

5. In *People v. Babb, supra,* the defendant was charged with violating Penal Code Section 286, but he was convicted of the old vagrancy statute, Penal Code Section 647.5, as a lesser included offense. This section of the statute was later held unconstitutional and finally repealed entirely in 1961. The relevant portions of the statute then read as follows: "Every idle, or lewd, or dissolute person . . . is a vagrant . . .". The Court held that the statute stated a public offense and went on to define the terms "lewd" and "dissolute" as follows: "Lewd and dissolute are terms often used interchangeably. Each applies to the unlawful indul-

gence in lust whether in public or private (*In re McCue*, 7 Cal.App. 765, 766) 'Lewd' is defined to mean: 'f. Lustful; libidinous; lascivious; unchaste'. 'Dissolute' is defined to mean: '2. . . . loose in morals and conduct; wanton; lewd; debauched'. (Webster's New Inter. Dict., 2d ed)".

6. The synonyms given by the Court above for the terms in question do not supply the required certainty for they are each susceptible to uncertainties of their own which are equally undefined by judicial interpretations or construction. The characterization by the Court that "lewd and dissolute" apply to the "unlawful indulgence in lust", circumvents the very question in issue, i.e. what is unlawful indulgence in lust? Unfortunately, judicial interpretation and definition does not aid in supplying the answers to the questions raised regarding the meaning of the terms in issue. Moreover, each of the cases which seek to uphold the definitions of the terms "lewdly" or "dissolute" all deal with fact situations which, (1) do not involve freedom of speech, press, artistic expression or theatrical entertainment, and (2) they deal either with juvenile delinquency or overt sexual acts or trespasses. The Courts have never in any written opinion applied either of the questioned statutes to cases where nudity or exposure of the human body occurs in the context of a theatrical performance or a stage production.